

2007 BCSECCOM 139

March 22, 2007

Headnote

Mutual Reliance Review System for Exemptive Relief Applications

Securities Act s. 114(2) Issuer Bids -Exemption from Issuer Bid Requirements - The issuer is making an issuer bid under a modified Dutch auction - It cannot disclose that it will take up and pay for shares deposited on a pro rata basis or the total number of shares it will acquire under the bid - The issuer is disclosing the maximum amount it will spend under the bid, and the minimum and maximum amount it will pay for shares tendered; as a result, the potential for confusion is minimal

Securities Rules s. 162(3) -Exemption from the Valuation Requirements - An issuer wants relief from the requirement to obtain a formal valuation in connection with an issuer bid for its outstanding securities - A liquid market for the issuer's securities exists prior to the bid; after the bid, there will be a market for the issuer's securities that is not materially less liquid than before the bid

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, s. 105(g), 114(2)

Securities Rules, B.C. Reg. 194/97, ss. 162(2) and 162(3)

Form 62-903F, Item 2 & Item 9

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec,
New Brunswick, Nova Scotia and Newfoundland and Labrador (Jurisdictions)

and

In the Matter of
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of
ING Canada Inc. (Filer)

MRRS Decision Document

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Background

The local securities regulatory authority or regulator (Decision Maker) in each of the Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (Legislation) that, in connection with the proposed purchase by the Filer of a portion of its outstanding common shares (the Shares) pursuant to an issuer bid (the Offer), the Filer be exempt from the following requirements in the Legislation:

- (a) to take up and pay for securities deposited pursuant to the Offer proportionately according to the number of securities deposited by each depositing security holder;
 - (b) to provide disclosure of the proportionate take-up and payment in the issuer bid circular (the Circular);
 - (c) to state the number of securities sought under the Offer in the Circular (the Number of Securities Requirement); and
 - (d) except in Ontario and Quebec, to obtain a formal valuation of the Shares and provide disclosure in the Circular of the valuation, or a summary thereof (the Valuation Requirement)
- (collectively, the Requested Relief).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the British Columbia Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

Representations

This decision is based on the following facts presented by the Filer:

1. the Filer is a corporation existing under the *Canada Business Corporations Act* and a reporting issuer in each of the Jurisdictions; the Filer is not in default of any requirement of the Legislation and is not on the list of defaulting reporting issuers maintained under the Legislation, where applicable;

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2. the authorized share capital of the Filer consists of an unlimited number of common shares (Shares), an unlimited number of Class A Shares and one Special Share, of which 133,732,000 Shares, no Class A Shares and one Special Share were issued and outstanding at February 1, 2007;
3. ING Groep N.V. is the beneficial owner of 93,620,000 Shares (representing approximately 70% of the outstanding Shares) and one Special Share;
4. the Shares are listed on the Toronto Stock Exchange (TSX);
5. on February 1, 2007, the closing price of the Shares on the TSX was C\$52.75 and on that date the Shares had an aggregate market value of approximately C\$7.05 billion, based on the closing price;
6. the Filer has issued the Shares under the CDSX book entry system administered by CDS Clearing and Depositary Services Inc. (CDS);
7. the Filer intends to make the Offer by way a modified Dutch auction procedure as follows:
 - (a) the Circular will specify that the maximum amount the Filer will purchase under the Offer is C\$500,000,000 (the Specified Amount);
 - (b) the Circular will specify the range of prices within which the Filer is prepared to purchase the Shares (the Price Range);
 - (c) the Filer will pay for the Shares it acquires under the Offer, together with the fees and expenses of the Offer, from available cash on hand;
 - (d) each holder of Shares (collectively, the Shareholders) wishing to tender to the Offer will have the right either to:
 - (i) specify the lowest price within the Price Range at which that Shareholder is willing to sell its tendered Shares (an Auction Tender),
or
 - (ii) elect to retain the Shareholder's proportionate interest in the Filer following the Offer (a Proportionate Tender);
 - (e) Shareholders may make multiple Auction Tenders but not in respect of the same Shares (that is, shareholders may tender different Shares at different prices but cannot tender the same Shares at different prices); Shareholders

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who make an Auction Tender may not make a Proportionate Tender;
Shareholders who make a Proportionate Tender may not make an Auction Tender;

- (f) the purchase price per Share (the Purchase Price) for Shares tendered to the Offer and not withdrawn will be the lowest price that enables the Filer to purchase that number of Shares tendered pursuant to valid Auction Tenders having an aggregate purchase price not exceeding an amount (Auction Tender Limit Amount) equal to C\$500,000,000 less the product of:
 - (i) C\$500,000,000; and
 - (ii) a fraction, the numerator of which is the aggregate number of Shares owned by shareholders making valid Proportionate Tenders and the denominator of which is the aggregate number of Shares outstanding at the time the Offer expires;
- (g) if the aggregate purchase price for Shares tendered pursuant to valid Auction Tenders at or below the Purchase Price is equal to or less than the Auction Tender Limit Amount, the Filer will purchase at the Purchase Price all the Shares tendered pursuant to valid Auction Tenders;
- (h) if the aggregate purchase price for Shares tendered pursuant to valid Auction Tenders at or below the Purchase Price is more than the Auction Tender Limit Amount, the Filer will purchase at the Purchase Price a portion of the Shares tendered pursuant to valid Auction Tenders as follows:
 - (i) first, the Filer will purchase all the Shares tendered by tendering Shareholders who hold in aggregate less than 100 Shares (Odd Lot Holders); and
 - (ii) second, the Filer will purchase on a pro rata basis that portion of the Shares tendered by the remaining tendering Shareholders having an aggregate purchase price equal to the Auction Tender Limit Amount less the amount paid by the Filer for the Shares tendered by Odd Lot Holders;
- (i) the Filer will purchase at the Purchase Price that portion of the Shares owned by Shareholders making valid Proportionate Tenders that results in the tendering shareholders maintaining their proportionate Share ownership following completion of the Offer;

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- (j) the ownership of Shares not purchased under the terms of the Offer will continue to be reflected in the book entry system administered by CDS unaffected by the Offer;
 - (k) all Shares purchased by the Filer pursuant to the Offer (including Shares tendered at Auction Prices below the Purchase Price) will be purchased at the Purchase Price; Shareholders will receive the Purchase Price in cash; all Auction Tenders and Proportionate Tenders will be subject to adjustment to avoid the purchase of fractional Shares; all payments to shareholders will be subject to deduction of applicable withholding taxes;
 - (l) if the Offer is undersubscribed by the initial expiration date but all the terms and conditions have been complied with except those waived by the Filer, the Filer may extend the Offer for at least 10 days, but the Legislation would require the Filer to first take up and pay for all Shares deposited and not withdrawn; all Shares tendered at that time and not withdrawn will be taken up and paid for at the Purchase Price, which would also be the price applicable for the Offer during the extended period;
 - (m) by the time any extended period is over, the Offer may be oversubscribed, in which case the Filer intends to pro-rate only among the tendered Shares received during the extension and after the original expiration date (and subject to the exception relating to Odd Lots described in (h) above);
8. ING Groep N.V. (which beneficially owns approximately 70% of the outstanding Shares) has advised the Filer that it intends to make a Proportionate Tender;
 9. until the expiry of the Offer, all information about the number of Shares tendered and the prices at which the Shares are tendered will be required to be kept confidential by the depositary and the Filer until the Purchase Price has been determined;
 10. shareholders who do not accept the Offer will continue to hold the number of Shares owned before the Offer and their proportionate Share ownership will increase following completion of the Offer;
 11. there is a "liquid market" in the Shares, as defined in OSC Rule 61-501 *Insider Bids, Issuer Bids, Business Combinations and Related Party Transactions* (OSC Rule 61-501);

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- (a) there is a published market for the Shares (on the TSX);
 - (b) during the 12-month period before December 31, 2006:
 - (i) the number of issued and outstanding Shares was at all times at least 5,000,000, excluding Shares beneficially owned, directly or indirectly, or over which control or direction was exercised, by related parties and Shares that were not freely tradeable;
 - (ii) the aggregate trading volume of the Shares on the TSX was at least 1,000,000 Shares;
 - (iii) there were at least 1,000 trades in Shares on the TSX; and
 - (iv) the aggregate value of trades on the TSX was at least C\$15,000,000; and
 - (c) the market value of the Shares on the TSX (determined in accordance with applicable rules) was at least C\$75,000,000 for December 2006;
12. the Filer has determined that it is reasonable to conclude that, following completion of the Offer, shareholders who do not tender to the Offer will continue to have available a market which is not materially less liquid than the market which exists prior to the Offer and the Filer intends to rely on the exemptions from the requirement to provide a formal valuation in section 3.4(3) of Ontario Securities Commission Rule 61-501 and section 3.4 of Regulation Q-27 (the Presumption of Liquid Market Exemptions);
13. the Filer cannot comply with the Number of Securities Requirement because it cannot specify the number of Shares it will acquire pursuant to the procedure described in paragraph 7 above;
14. the Circular will:
- (a) disclose the mechanics for the take-up of and payment for Shares as described in paragraph 7 above;
 - (b) explain that, by tendering Shares at the lowest price in the Price Range under an Auction Tender or under a Proportionate Tender, a Shareholder can reasonably expect that the Shares so tendered will be purchased at the Purchase Price, subject to proration and the other terms of the Offer as described in paragraph 7 above;

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- (c) disclose that ING Groep has advised that it intends to make a Proportionate Tender;
- (d) disclose the facts supporting the Filer's reliance on the Presumption of Liquid Market Exemptions as updated to the date of the announcement of the Offer; and
- (e) except to the extent exemptive relief is granted by this decision, contain the disclosure prescribed by the Legislation for issuer bids.

Decision

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted provided that:

- (a) Shares deposited under the Offer and not withdrawn are taken up and paid for, or dealt with, in the manner described in paragraph 7 above; and
- (b) for the Valuation Requirement, the Filer can rely on the Presumption of Liquid Market Exemptions.

Martin Eady, CA
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British Columbia Securities Commission